

Abd Rauf bin Alif v Suruhanjaya Pasukan Polis & Anor A

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO W-01-289
OF 1996

GOPAL SRI RAM, ABDUL KADIR SULAIMAN AND ALAUDDIN JJCA

14 JUNE 2002

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Administrative Law — Rights and liabilities of public servants — Termination of service of member of public service — Distinction between termination of service and dismissal — Whether such distinction recognized in Malaysia

Labor Law — Employment — Termination of service — Distinction between termination of service and dismissal — Whether such distinction recognized in Malaysia

C

The appellant was engaged as a probationer with the rank of assistant superintendent of police. His contract of employment provided for the termination of service during the probationary period by either one month's notice or one month's salary in lieu of notice. He was subsequently asked to show cause why his services should not be terminated and called upon to make representations in answer. Although he made representations, the appellant's services were terminated and he was paid one month's salary in lieu of notice. The appellant's action for reinstatement was dismissed in the High Court and he appealed to the Court of Appeal.

D**E**

Held, dismissing the appeal:

This was a case of termination simpliciter. Under the laws of Malaysia, a distinction between dismissal and termination of services exists. The law also recognizes a distinction between a probationer and a permanent employee, be it in the public or private sector. The appeal was thus devoid of merit (see p 20D–F, H–I); *Government of Malaysia v Lionel* [1974] 1 MLJ 3 followed and *Lionel v Government of Malaysia* [1971] 2 MLJ 172 referred.

F**G****[Bahasa Malaysia summary]**

Perayu telah diambil kerja sebagai seorang pegawai dalam percubaan dengan pangkat timbalan penguasa polis. Perjanjian pekerjaan beliau memperuntukkan penamatan perkhidmatan semasa tempoh percubaan dengan notis satu bulan ataupun gaji satu bulan sebagai ganti notis. Beliau kemudiannya diminta menunjukkan sebab kenapa perkhidmatannya tidak patut diberhentikan dan telah diminta membuat representasi-representasi dalam jawapan. Walaupun beliau membuat representasi-representasi, perkhidmatan perayu telah ditamatkan dan beliau telah dibayar gaji satu bulan sebagai ganti notis. Tindakan perayu untuk mengembalikan semula pangkatnya telah ditolak di Mahkamah Tinggi dan beliau telah merayu kepada Mahkamah Rayuan.

H**I**

- A** **Diputuskan**, menolak rayuan tersebut:
Kes ini merupakan kes penamatan kerja simpliciter. Di bawah undang-undang Malaysia, terdapat perbezaan di antara pemecatan dan penamatan perkhidmatan. Undang-undang juga mengiktirafkan perbezaan di antara seorang pegawai dalam percubaan dan seorang pekerja tetap, sama ada di dalam sektor awam ataupun sektor swasta.
- B** Rayuan tersebut tidak mempunyai merit (lihat ms 20D–F, H–I; *Government of Malaysia v Lionel* [1974] 1 MLJ 3 diikuti dan *Lionel v Government of Malaysia* [1971] 2 MLJ 172 dirujuk).

Notes

- C** For cases on termination of service of member of public service, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 723–725.
For cases on termination of service, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1082–1119.

D Cases referred to

Government of Malaysia v Lionel [1974] 1 MLJ 3 (folld)
Lionel v Government of Malaysia [1971] 2 MLJ 172 (refd)

E Legislation referred to

Federal Constitution art 135(2)

Appeal from: Civil Suit No S7–21–219 of 1990 (High Court, Kuala Lumpur)

- F** *Karpal Singh* (*Jagdeep Singh Deo* with him) (*Karpal Singh & Co*) for the appellant.

Dato' Mary Lim Thiam Suan (*Aliza Jamaluddin* and *Anita Mary Fernandez* with her) (Attorney General's Chambers) for the respondents.

- G** **Gopal Sri Ram JCA** (delivering judgment of the court): By a contract dated 8 December 1984, the appellant was engaged as a probationer with the rank of a cadet assistant superintendent of police. One of the terms of his contract was that he would be confirmed in this service provided that he obtained a letter of recommendation from his head of department.

- H** On 9 February 1989, the appellant was served with a letter asking him to show cause why his services should not be terminated and calling upon him to make representations in answer. By a letter dated 1 March 1989, the appellant made his representations. By a letter dated 16 November 1989, the appellant's services were terminated and he was paid one month's salary in lieu of notice.

- I** We pause here to mention that the appellant's contract of employment provides in cl 3(iv) for the termination of service during the probationary period by either one month's notice or one month's salary in lieu of notice.

The letter of termination refers to a letter of representation from the appellant dated 13 April 1989. The appellant's case is that there was in fact no such letter. Accordingly, he had been denied natural justice in that his termination was based on a non-existent letter. This is the identical argument advanced by the appellant in the court below.

At the trial of the appellant's action for reinstatement, the defendants elected not to call evidence. Their argument was that here there was no dismissal at all but only termination simpliciter. The learned judge accepted that argument and dismissed the appellant's claim.

In our view, the present appeal is already covered by high authority which is binding upon us. It is the decision of the Privy Council in *Government of Malaysia v Lionel* [1974] 1 MLJ 3. That was a case involving a temporary officer who was on contract to serve the second respondent in that appeal. He had been served with a letter to show cause, not dissimilar from that issued to the appellant in the present instance. Lionel argued that he had been wrongfully dismissed contrary to art 135(2) of the Federal Constitution which requires a reasonable opportunity to be given to a civil servant before his dismissal. At first instance Syed Othman J, a judge for whose decisions this court has much respect, held that Lionel was not dismissed at all and that his was a case of termination simpliciter in accordance with the terms and conditions of his contract of service. Lionel then appealed to the Federal Court which held that there had been a breach of art 135(2) and that the provisions of the Constitution could not be contracted out of — see *Lionel v Government of Malaysia* [1971] 2 MLJ 172 at p 173. Accordingly the Federal Court reversed Syed Othman J. The Government of Malaysia then appealed to the Privy Council which reversed the Federal Court judgment and restored the judgment at first instance.

The advice of the Board on that occasion was delivered by Viscount Dilhorne who said at p 5:

Under English law a servant may be summarily dismissed for disobedience to orders or misconduct or may have his employment terminated by notice or the payment of wages in lieu of notice. *Under the laws of Malaysia a similar distinction between dismissal and termination of services appears to exist* and in their Lordships' opinion there is nothing in the Constitution which affects the right of the Government to terminate temporary employment in accordance with the terms of the engagement. Their Lordships do not agree with Ong CJ that reg 36 is to be regarded as invalid as inconsistent with the Constitution. (Emphasis added.)

We are bound by this statement of principle. It applies squarely to the facts of the present appeal. If Lionel could not succeed, we can hardly see how the present appellant can.

We could only make this further observation. This is a case of a probationer. And the law has always recognized a distinction between a probationer and a permanent employee, be it in the public or private sector.

For the reasons already given, we agree with the judgment of the learned trial judge in the present case. The appeal is devoid of merit. It is

A dismissed. The deposit in court shall be paid to the respondents who shall have the costs of this appeal as taxed by a proper officer of this court.

Before we conclude, we would record our appreciation to both Mr Karpal Singh and Dato' Mary Lim for their clear and cogent submissions before us this morning. Without their effort this *ex tempore* judgment would not have been possible.

B *Appeal dismissed.*

Reported by Andrew Christopher Simon

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